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No. 75-1594

In the Supreme Court of the United States

OCTOBER TERM, 1975

KENNEBEC LOG DRIVING CO., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B, pp. 14a-22a) is reported at 530 F. 2d 446. The opinion of the district court (Pet. App. A, pp. 1a-13a) is reported at 399 F. Supp. 754.

JURISDICTION

The judgment of the court of appeals (Pet. App. C, p. 23a) was entered on February 18, 1976. The petition for a writ of certiorari was filed on April 30, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the deposit of sunken logs and log fragments into navigable waterways, incident to commercial

log-driving operations, is covered by Section 13 of the Rivers and Harbors Act of 1899.

STATUTORY PROVISIONS INVOLVED

Sections 13 and 15 of the Rivers and Harbors Act of 1899, 30 Stat. 1152, 33 U.S.C. 407 and 409, and the relevant provisions of the Act of May 9, 1900, 31 Stat. 172, 33 U.S.C. 410, are set forth at Pet. App. E, pp. 25a-27a.

STATEMENT

The United States brought this action in 1971 to enjoin petitioners from continuing to use the Kennebec River in Maine for log drives and to require them to remove from the river any refuse deposited by them during past log-driving activities. The complaint asserted that petitioners' operations on the Kennebec River—specifically, their preemption of the surface of the river with floating logs and log booms and the resulting deposit of decaying logs and log fragments on the river bottom (which had consumed all the oxygen in the water, thereby preventing acquatic life)—had occurred and were occurring in violation of Sections 10 and 13 of the Rivers and Harbors Act of 1899, 33 U.S.C. 403 and 407.

Petitioners' principal defense was that the Act of May 9, 1900, 33 U.S.C. 410, superseded the entire 1899 Act with respect to log driving and subjected log drivers only to such regulations as the Secretary of the Army may impose, and none were imposed here.[1] The district

[1]Petitioners conceded that the portion of the Kennebec River affected by their log-driving activities is navigable, within the meaning of the Rivers and Harbors Act, and that they have never applied for or obtained a permit from the Secretary of the Army authorizing those activities (see Pet. App. A, p. 2a, n. 1).

court, in a decision rendered before this Court's decision in *United States* v. *Pennsylvania Industrial Chemical Corp.*, 411 U.S. 655, granted petitioners' motion for summary judgment and dismissed the complaint, holding that in light of the Act of May 9, 1900, neither Section 10 nor Section 13 of the Rivers and Harbors Act applies to log driving on the Kennebec River. 356 F. Supp. 344 (D. Me.).

The court of appeals vacated the judgment of the district court. It held that the 1900 Act superseded Sections 10 and 15 of the 1899 Act (which deal with obstructions to navigation) but that nothing in the 1900 Act or its legislative history exempts log driving from the restrictions on pollution contained in Section 13 of the 1899 Act. Although the court thus held that Section 13 is "facially applicable" to petitioners' log-driving activities and that "pealed bark and sunken logs on the river bottom are deposits of 'refuse matter' within the meaning of Section 13," it nevertheless remanded the case to the district court to determine whether petitioners' deposit of sunken logs and log fragments are "so intimately related to the actual conduct of navigation by water that despite the facial applicability of [Section 13] it could not have been in the contemplation of Congress that it apply in such instances" (491 F. 2d 562, 570 (C.A. 1)).[2] This Court denied the petition for a writ of certiorari filed by the present petitioners. 417 U.S. 910.

[2]In response to the government's motion for reconsideration, which pointed out that the court's opinion could be construed as an implicit ruling that Section 13 of the 1899 Act is not applicable to deposits of refuse "intimately related to the actual conduct of navigation by water," the court of appeals amended its opinion to make clear that it meant "to intimate no view as to whether or not any such interpretation of the language of the statute can be justified, nor, if it can, whether [petitioners] can take advantage of it" (491 F. 2d at 570-571, n. 27).

On remand, the district court held that although the deposit of some refuse matter is an unavoidable incident of log driving, "Section 13's all-inclusive coverage of 'any refuse matter of any kind or description whatever' " precludes a judicially-created exception such as that suggested by petitioners (Pet. App. A, p. 7a). The court also specifically rejected petitioners' assertion that since Congress, in the 1900 Act, had made log driving on rivers such as the Kennebec a lawful form of navigation, it could not have intended to leave intact the restrictions on such activity contained in Section 13 of the 1899 Act (*id.* at 9a; footnote omitted):

> To the extent Section 13 establishes a regulatory scheme for controlling pollution, there is no inherent conflict between Congress' desire to authorize log driving and at the same time to subject it to such restrictions as may be necessary to minimize the adverse ecological impact of log driving upon navigable waters.

The court therefore granted the government's motion for a declaratory judgment confirming the applicability of Section 13 of the Rivers and Harbors Act of 1899 to petitioners' log-driving activities. But it reserved ruling on the government's request for injunctive relief, pending "such further proceedings as may be necessary to enable the [c]ourt to frame an equitable decree" (*id.* at 12a), and it certified pursuant to 28 U.S.C. 1292(b) the issue of the coverage of Section 13. The court of appeals permitted an interlocutory appeal and affirmed, leaving to the district court "the question of the availability and extent of retrospective relief" (Pet. App. B, pp. 21a-22a).

ARGUMENT

1. The government's original request for injunctive relief prohibiting petitioners from continuing to use the Kennebec River for log driving, in the absence of a permit authorizing such use, has been rendered largely academic by the enactment by the Maine legislature of a statute prohibiting all log driving on Maine rivers as of October 1, 1976 (38 Maine Rev. Stat. Ann. 418 (1975 Cum. Supp.)), and by petitioners' publicly-stated intention to end their log drives on the Kennebec "no later than October 1, 1976" (see Pet. 6-7). Moreover, as already noted, the district court has reserved ruling on the government's only remaining request for relief—an order directing petitioners to submit a plan to restore the Kennebec—pending further proceedings in that court (Pet. App. A, p. 12a). If, at the conclusion of this case, the government's request for an order requiring petitioners to assist in the removal from the Kennebec of refuse deposited by them in connection with their log-driving activities is denied, petitioners would no longer have any cause for complaint. We therefore believe that the present petition is premature and on that basis alone should be denied.

2. The decision below is, in any event, correct, and further review is not warranted. Section 13 of the Rivers and Harbors Act of 1899, 33 U.S.C. 407, prohibits, in pertinent part, the discharge into navigable waters of the United States of "any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state" unless prior authorization is obtained from the Secretary of the Army. This Court has emphasized repeatedly that this language means precisely what it says: that is, that "[t]he word 'refuse' includes all foreign substances and pollutants apart from those 'flowing from

streets and sewers and passing therefrom in a liquid state' into the watercourse" (*United States* v. *Standard Oil Co.*, 384 U.S. 224, 230; see also *United States* v. *Pennsylvania Industrial Chemical Corp., supra*, 411 U.S. at 669; *Illinois* v. *City of Milwaukee*, 406 U.S. 91, 101; *United States* v. *Republic Steel Corp.*, 362 U.S. 482, 490-491).

Petitioners apparently concede that the sunken logs and log fragments deposited by them in the Kennebec River are "refuse matter," within the meaning of Section 13 (see Pet. App. A, pp. 5a-6a). They contend, however, that Section 13 cannot reasonably be construed to apply to such matter because (1) Congress was aware at the time it enacted the Act of May 9, 1900, 33 U.S.C. 410, that the deposit of sunken logs and log fragments occurs inevitably in any log drive; (2) Congress nevertheless concluded that log driving should be permitted to continue on rivers such as the Kennebec where it had been the principal form of navigation; and (3) the practical impact of holding that Section 13 applies to log driving is to render all log driving illegal—a result squarely at odds with express congressional intent.

Petitioners purport to find support for these contentions in *United States* v. *Pennsylvania Industrial Chemical Corp., supra (PICCO)*, and *Train* v. *National Resources Defense Council*, 421 U.S. 60. According to petitioners, this Court's conclusion in *PICCO* that the Secretary of the Army has no statutory duty to issue permits under Section 13 means that "the only way to harmonize the statute with the recognized Congressional purpose of allowing [log driving] to go forward is to hold the [statute] inapplicable to any unavoidable pollutional side effects which such navigation may have" (Pet. 14-15). Alternatively, petitioners assert that the fact that the Secretary of the Army has not undertaken to control,

through the issuance of permits, the deposit of refuse matter incident to commercial log-driving activities constitutes an administrative interpretation that Section 13 does not apply to such activities and that, under *Train*, the Secretary's interpretation of Section 13 is binding on the courts.

The fundamental defect in petitioners' contentions is, as the courts below noted (see Pet. App. A, pp. 8a-9a; Pet. App. B, pp. 20a-21a), that Section 13 does not absolutely prohibit the discharge of refuse into navigable waters; it simply subjects such discharges to administrative regulation in accordance with the stated purposes of the Rivers and Harbors Act. There is no inconsistency between Congress' decision, as expressed in the Act of May 9, 1900, to remove the absolute prohibition on log driving contained in Section 15 of the Rivers and Harbors Act, 33 U.S.C. 409, but to continue to subject that activity to reasonable administrative regulation designed to minimize the adverse effects of the consequent deposit of refuse matter. Indeed, petitioners' construction of the Act of May 9, 1900, would drastically curtail, if not nullify, Section 13 by relieving individuals of any obligation to comply with the permit provisions of that section whenever the particular activity at issue is otherwise "lawful." Nothing in the text or legislative history of the Act of May 9, 1900, supports petitioners' assertion that Congress intended thereby to modify or repeal Section 13 of the 1899 Act. At best, petitioners' contentions would create a repeal by implication, which should not be imputed to Congress. See *United States* v. *Jackson*, 302 U.S. 628, 631; *Posadas* v. *National City Bank*, 296 U.S. 497, 503.

This Court's decisions in *PICCO, supra*, and *Train* v. *National Resources Defense Council, supra*, are not to the contrary. The conclusion in *PICCO* that Section 13

of the Rivers and Harbors Act confers upon the Secretary of the Army discretion in deciding whether, and under what circumstances, to issue permits authorizing the discharge of refuse matter into navigable waters is entirely consistent with the conclusion that Congress intended in the Act of May 9, 1900, simply to modify the balance struck in the 1899 Act concerning obstructions to navigation resulting from log driving and steamboat traffic. *PICCO* does not support petitioners' assertion that Congress also intended in the 1900 Act to eliminate the requirement that log drivers, as well as other users of navigable rivers and harbors, secure permits before depositing refuse matter in those waters.

As to petitioners' argument that *Train* v. *National Resources Defense Council* requires that the administrative interpretation of a statute be given great weight, petitioners point to no regulation or ruling by the Secretary of the Army stating that Section 13 of the Rivers and Harbors Act does not apply to their activities. To be sure, the Secretary of the Army has not used the authority conferred by Section 13 to issue permits designed to minimize the damage to the environment caused by log-driving activities. But as this Court held in *PICCO*, even affirmative administrative action construing Section 13 cannot be relied upon to excuse actions that would otherwise violate that statute. 411 U.S. at 670-675. As the courts below recognized (Pet. App. A, p. 11a; Pet. App. B, pp. 20a-21a), moreover, the extent of petitioners' reasonable reliance upon long-standing governmental inaction with respect to commercial log driving may be relevant to the framing of appropriate equitable relief. But whether petitioners are entitled thus to benefit from such inaction depends upon the resolution of factual issues not yet fully explored by the district court.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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